

# INTERNATIONAL DELEGATION AND STATE SOVEREIGNTY

OONA A. HATHAWAY\*

## I

### INTRODUCTION

International law's strength and reach have grown significantly over the last half-century. Once the province primarily of diplomatic and trade treaties, international law now reaches not just interactions between states but states' behavior within their own borders as well. In the early years of the twenty-first century, more than 100,000 international treaties cover topics ranging from taxation to trade to torture—and just about everything in between.<sup>1</sup>

This revolution in international law has brought with it many new challenges. Perhaps the greatest is the increasingly salient tension between the ideal of state sovereignty and the notion of international order based on law. State sovereignty requires that states have ultimate and independent authority to govern themselves and those within their territory. Yet states now routinely make legal promises that are perceived to lie in direct conflict with this conception of sovereignty, including delegating to international institutions authority that has traditionally been held exclusively by states.

This progression has not been without controversy or resistance. Indeed, it has given rise to a powerful backlash in the United States and elsewhere. Critics of international law fear that its ever-expanding scope will encroach on domestic law and authority, taking power from local authorities and delegating it to international actors that are far removed—physically, culturally, and politically—from those they seek to govern.

Much of the recent scholarly and public debate about international law has been motivated by these concerns. Beginning in the 1990s, a series of legal

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\* Associate Professor of Law, Yale Law School. My thanks to participants in the Middle East Legal Studies Seminar, the Duke University International Delegation Workshop, the Georgetown International Law Colloquium, the Stanford University International Law Colloquium, and the Princeton University International Relations Faculty Workshop, and especially to Curtis Bradley, Steve Charnovitz, Jacob Hacker, Judith Kelley, Mark Pollack, Scott Shapiro, and Richard Steinberg, for their helpful comments on earlier versions of this article.

1. The United Nations Treaty Series currently contains more than 158,000 treaties and related subsequent actions. United Nations, United Nations Treaty Collection Overview, *available at* <http://untreaty.un.org/English/overview.asp> (last visited Aug. 25, 2007).

scholars criticized international law as posing a threat to state sovereignty.<sup>2</sup> Sometimes termed the “New Sovereignists,”<sup>3</sup> these scholars regard much of international law as a threat to both internal and external sovereignty. Though their precise objections to international law are many and varied, one central theme holds constant across these criticisms: Modern international law gives too much power to foreign states and international organizations, stripping authority from domestic lawmaking institutions.<sup>4</sup> This is especially true of international agreements in which states grant authority to international bodies to make decisions or take actions in a process referred to as “international delegation.”

This article addresses the challenge to international law posed by these critiques. Although tension between international delegation and state sovereignty does exist, the recent body of work errs in assuming that states’ sovereignty almost always suffers when states delegate authority to international institutions. In doing so, recent scholarship portrays the costs of delegation as larger than they in fact are. Moreover, recent work has lost sight of some of the substantial *benefits* of cooperation. In short, this article takes seriously the frequently voiced concerns about state sovereignty but shows that the field of conflict between international law and sovereignty is not nearly as extensive as critics suggest.

This is not just an academic discussion. In the last decade, U.S. leaders have proven acutely reluctant to join some of the most significant international initiatives. They have, for example, refused to delegate authority to international bodies designed to monitor and control emissions of greenhouse gases and to judge the conduct of persons who have committed the most egregious international crimes. These decisions should be reconsidered in light of a more careful accounting of the costs and benefits of international cooperation than has so far been offered by either the traditional international legal establishment or its New Sovereignist challengers.

The primary focus in what follows is international delegation, both because that is the latest focus of the literature (and the focus of the symposium of which this piece is a part) and because it is a domain in which sovereignty costs

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2. Some of the key works in this vein include JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

3. The term was coined by Peter Spiro in his excellent article, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 9, available at <http://www.foreignaffairs.org/2000/6.html> (follow “The New Sovereignists” hyperlink) (last visited Sept. 3, 2007).

4. For example, at a conference titled *Trends in Global Governance: Do They Threaten American Sovereignty?*, John Yoo, a professor at the University of California at Berkeley, cautioned that “[n]ovel forms of international cooperation increasingly call for the transfer of rulemaking authority to international organizations that lack American openness and accountability.” *UN Wars, US War Powers*, 1 CHI. J. INT’L L. 355, 361 (2000).

are perceived to be most salient. However, this article also briefly examines aspects of international law that are not properly described as delegation. International law and international delegation are deeply intertwined: international delegation arises from international law, and most international law designed to have binding effect involves some form of delegation. Hence, it is often necessary to expand our field of vision to include both if we are to understand either one.

Part II of this article outlines the challenge to sovereignty posed by international law and especially international delegation. Two decades ago, Robert Putnam used the metaphor of the two-level chess game to illustrate the influence that the domestic and international spheres can have on one another. Today, scholars continue this project, focusing in particular on when and how international legal commitments affect domestic governance. This conversation has most recently come to center on international delegation, for such delegations bring the perceived conflict between state sovereignty and international law to the fore.

In Part III, I reconsider the sovereignty costs of international delegation, arguing in particular that when state consent to delegation is taken into account, the scope of conflict between sovereignty and international delegation is substantially narrowed. Nonetheless, international delegation can be in tension with state sovereignty, and the key sources of this tension are outlined as a preface to the discussion of the other side of the cost-benefit equation—namely, the potential benefits.

Part IV turns to these benefits, examining how the intrusion of international law into areas that were once exclusively domestic might be explained and justified. Whether sovereignty costs lead us to question the wisdom of specific delegations hinges on the benefits that balance against those costs. Many acts of delegation, for example, allow states to achieve ends that would otherwise be unattainable, enhancing their authority over the longer term. Moreover (and more controversially), an imposition on state sovereignty might be justified by reference to other values—the well-being or rights of citizens chief among them. Exploring both sides of the equation in greater depth can lead to a deeper and more empirically grounded argument about the proper role of international law and delegation in an age of global interdependence. Doing so also reveals that international delegation is often more accurately seen as an exercise of state sovereign authority than a diminution of it.

## II

### THE SOVEREIGNTY CHALLENGE

In the late 1980s, Robert Putnam proposed viewing the relationship between international and domestic politics through the lens of what he called

the “two-level game”:<sup>5</sup> At the national level, domestic groups pursue their interests by pressuring the government to adopt their favored policies, and politicians seek power and influence by constructing coalitions among these groups. At the international level, governments aim to maximize their ability to satisfy domestic pressures, while at the same time seeking to avoid adverse foreign developments. Although Putnam was not thinking specifically of international delegation or international law when he wrote of the two-level game, the metaphor provides a useful tool for thinking about the ways in which international law and domestic politics are interwoven and mutually causative.

In recent years, one half of the “game” described by Putnam—the impact of international law and politics on domestic law and politics—has become a central subject of debate in legal scholarship. Critics of international law have expressed concern about the instances in which international law infringes on domestic sovereign authority.<sup>6</sup> Their discomfort, and hence their criticism, stems from the shared premise that the state ought to retain unfettered authority to make the laws that govern its own citizens.<sup>7</sup> In this view, international law takes authority out of the hands of local decisionmakers and gives it to persons and locations far removed from those the law governs, undermining self-government and the value of citizenship within the state in the process.<sup>8</sup>

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5. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

6. See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1567–82 (2003) (examining U.S. participation in international delegations and resulting implications for U.S. domestic sovereignty); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 88–113 (2000) (discussing the transfer of some federal powers to international organizations). See generally Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004) (considering the constitutional implications of delegating legislative authority to international organizations); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527 (2003) (discussing the effects of globalization and globalized lawmaking on the structure of the U.S. Constitution and U.S. lawmaking). This debate has played out in the public eye most recently in the debate over the use of foreign and international law by U.S. courts. See, e.g., Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June–July 2005, at 33, available at <http://www.hoover.org/publications/policyreview/2932196.html> (last visited Sept. 3, 2007) (discussing the use of foreign and international law in recent U.S. Supreme Court opinions).

7. See Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1415–20 (2006) (reviewing *The Limits of International Law*, by Jack L. Goldsmith & Eric A. Posner, and discussing the underlying premise that states do, and should continue to, act in their own self-interest when complying with international law).

8. Moreover, when the countries affected are democratic, the critics raise the specter of not just a shift of power from local authorities to distant decisionmakers, but a shift of power from democratic domestic institutions to unelected, undemocratic, and unaccountable international organizations. New Sovereignists, of course, are not the only ones who are worried about whether international institutions are sufficiently democratic and accountable. Even the strongest advocates of international law recognize the possible problems. See, e.g., Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005) (addressing the problem of accountability at the global level and suggesting methods for improvement). A three-year ongoing project in Global Administrative Law centered at NYU also aims to address such problems. See Institute for International Law and Justice, Welcome to the Website of the Global International Law Project, [http://www.iilj.org/global\\_adlaw/](http://www.iilj.org/global_adlaw/) (last visited Sept. 3, 2007).

Political scientists who study international law have also considered the impact of international legal commitments on state sovereignty. In a paper published as part of a symposium on “Legalization and World Politics”—a symposium that signaled a renewed interest in international law among political scientists—Kenneth Abbott and Duncan Snidal suggest that international law that is effective necessarily impinges on state sovereignty. “Sovereignty costs,” they argue, “range from simple differences in outcome on particular issues, to loss of authority over decisionmaking in an issue-area, to more fundamental encroachments on state sovereignty.”<sup>9</sup>

If international agreements as a general matter impose sovereignty costs, as these prior works suggest, this must be all the more true of international delegation.<sup>10</sup> In a typical international delegation, a state grants authority to an international body by ratifying an international treaty.<sup>11</sup> Nearly all international delegations thus involve international agreements.<sup>12</sup> The reverse, however, is not true: not all international agreements involve delegation. For example, the Universal Declaration of Human Rights<sup>13</sup> is international law (though as a declaration, it is not legally binding), but it involves no international delegation because it does not grant authority to any international organization.<sup>14</sup>

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9. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 436–37 (2000). Shortly before Abbott and Snidal, Andrew Moravcsik used the term to refer to “the surrender of national discretion” in a discussion of states’ decisions to accede to the European Convention on Human Rights. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 227 (2000). The earliest use of the phrase seems to be in a discussion of the European Recovery Program by Robert Pahre, *Multilateral Cooperation in an Iterated Prisoner’s Dilemma*, 38 J. CONFLICT RESOL. 326, 349 (1994).

10. There is the separate question whether nonconsensual international law—customary law and *ius cogens*—imposes sovereignty costs. Because such international law never involves delegations of authority as defined in Curtis A. Bradley & Judith Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1 (Winter 2008), the topic is put to one side in this paper.

11. *Id.* at 3–4. To be considered a delegation, it is not necessary that the actions of the international body be formally binding on states as a matter of international law—that is instead a factor to be considered in assessing the degree of delegation. *Id.* at 4.

12. If one includes delegation to private entities in the definition of “international delegation,” then it is possible to have an international delegation without an international agreement (consider the International Accounting Standard Board mentioned in *id.* at 8). However, the vast majority of international delegations (and the most significant ones substantively) are created by multilateral international agreements.

13. Dec. 10, 1948, U.N. Doc. A/810 (Dec. 12, 1948), *available at* <http://www.unhcr.ch/udhr/lang/eng.pdf> (last visited Sept. 3, 2007).

14. A substantial number of bilateral international agreements are binding but involve no delegation (extradition agreements, for example), but most multilateral agreements that are intended to be binding do include at least some minimal delegation. The Convention on the Prevention and Punishment of the Crime of Genocide is largely intended to set standards of conduct, but like most binding multilateral agreements it does include an explicit delegation:

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. 9, *approved* Dec. 9, 1948, 78 U.N.T.S. 277, *available at* [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm) (last visited Sept. 3, 2007). (Notably, large numbers of ratifying states opted out of this delegation by entering reservations indicating either that they did not accept this provision or that their express

International delegations might be thought of, therefore, as including that subset of international agreements in which states explicitly relinquish authority to an international actor and, hence, in which sovereignty costs could be thought to be most salient. Indeed, an international agreement that does not involve a delegation of authority to an international institution likely imposes little or no sovereignty costs on states.<sup>15</sup> It is the natural progression of this literature, therefore, to focus on international delegations, for it is here that some of the most significant issues lie.

The remainder of this article considers the effects of international delegation on state sovereignty, which lies at the core of the current debate over international agreements and state sovereignty. If we can find a way to manage the conflict between sovereignty and international law here, where it is so pronounced, then perhaps that resolution can serve as a guide to reconciliation of the broader conflict.

### III

#### SOVEREIGNTY COSTS OF DELEGATION RECONSIDERED

To evaluate the critique of international delegation, it is necessary first to consider more carefully the concept of sovereignty, which lies at the heart of delegation. As noted above, the term “sovereignty costs” is generally used in legal and political-science literature to refer to reductions in state autonomy, or, more precisely, to intervention in the domestic authority structure. It is worth pausing to further unpack this conception of sovereignty before proceeding to consider whether and how international delegations impinge on it.

State sovereignty is best understood as a bundle of properties rather than as a single characteristic.<sup>16</sup> Four of these properties stand out: (1) the authority to

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consent would be required to submit a dispute under the Genocide Convention to the International Court of Justice.)

15. Whether international law that does not involve a delegation of authority to an international institution gives rise to sovereignty costs depends in part on precisely how one defines sovereignty costs. If one accepts Abbott and Snidal’s definition of sovereignty costs as encompassing everything from “simple differences in outcome on particular issues” to “fundamental encroachments on state sovereignty,” then any international law that is effective (that is, that modifies state behavior in some way) necessarily imposes a sovereignty cost. Abbott & Snidal, *supra* note 9, at 436. Yet taken literally at least, this seems an excessively broad definition, for it means that any event or action that leads to a different outcome imposes a cost on state sovereignty. As discussed below, more widely accepted today is a definition that emphasizes reductions in state autonomy. See, e.g., Bradley & Kelley, *supra* note 10, at 27 (citing recent definitions). By this definition, international agreements that do not include a delegation would be highly unlikely to entail sovereignty costs.

16. This definition builds on, but is distinct from, classical conceptions of sovereignty. In the classical view, a sovereign must not only be the highest and final authority, but its authority must also be absolute, unlimited, and exclusive. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 40 (1902) (“[T]here . . . must be in all of [the several forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.”). Hobbes and Rousseau shared this view. THOMAS HOBBES, LEVIATHAN 155 (E.P. Dutton & Co. 1950) (1881); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 69 (Maurice Cranston trans., Penguin Books 1969) (1762). Few scholars today would agree that sovereignty must be

govern,<sup>17</sup> (2) the supremacy of the governing authority,<sup>18</sup> (3) the independence of the governing authority, and finally (4) the territoriality of the governing authority.<sup>19</sup>

The third of these characteristics deserves special attention here. To be sovereign, a state must be independent, which means that the state cannot be put under a duty or obligation by those external to it. Historically, the issue of sovereign-state independence has come up most commonly in the context of colonial relationships. Modern issues of dependence and independence tend to be less starkly all-or-nothing. In discussions of state sovereignty, independence refers to the degree to which a state is free from external authority. H.L.A. Hart put it thus: “[T]he word ‘sovereign’ means here no more than ‘independent’ . . . . [A] sovereign state is one *not* subject to certain types of control, and its sovereignty is that area of conduct in which it is autonomous.”<sup>20</sup>

Turning now to international delegations, the definition offered for this symposium states that an international delegation is “a grant of authority by two or more states to an international body to make decision or take actions.”<sup>21</sup> When such grants of authority are made, a state may be said to relinquish some degree of autonomy. And, indeed, this is the claim of those concerned about the effect of delegations on sovereign authority: Having delegated authority to an

absolute and unlimited, and that absolute and unlimited sovereignty is not an element of the definition offered here. *See, e.g.*, CHRISTOPHER W. MORRIS, AN ESSAY ON THE MODERN STATE 177–93 (1998).

17. A has sovereignty over B if A has the authority to govern the behavior of B, for example, by making rules that constrain B’s conduct. *See* THOMAS POGGE, 103 ETHICS 48, 57 (1992); Pogge begins his description of state sovereignty by considering sovereignty as a two-place relation:

A is sovereign over B if and only if

(1) A is a governmental body or officer . . . , and

(2) B are persons, and

(3) A has unsupervised and irrevocable authority over B (a) to lay down rules constraining their conduct; or (b) to judge their compliance with rules; or (c) to enforce rules against them through preemption, prevention, or punishments; or (d) to act in their behalf vis-à-vis other agencies . . . or persons . . . .

*Id.*

18. To be sovereign, the state has to be not just *an* authority, but the *highest* authority. *See, e.g.*, MORRIS, *supra* note 16, at 177 (“An authority may be ultimate if it is the *highest* authority.”). Sovereignty thus requires a “hierarchy of authorities,” *id.*, with one superseding all others. In the United States, for example, the federal government is supreme over state governments, because on matters within its purview its rules and judgments supersede those of the states. It must, moreover, be final. The sovereign’s decision must not be subject to appeal, for if it were, the authority to which the decision is appealed would be higher than the sovereign itself. *See* F.H. HINSLEY, SOVEREIGNTY 1 (2d ed., Cambridge Univ. Press 1986) (1966) (defining sovereignty as the “final and absolute authority in the political community”). Stephen Krasner expresses a similar idea when he notes that Westphalian sovereignty rests on “the exclusion of external actors from [domestic] authority structures.” SOVEREIGNTY: ORGANIZED HYPOCRISY 4 (1999).

19. Territoriality is a distinctive characteristic of modern *state* sovereignty. It means that each state is associated with a defined territorial space and each territorial space is associated with a particular governing state authority. Of course, the appropriate governing authority and precise territorial bounds may be contested. For example, both the states of India and Pakistan claim sovereignty over the territory of Kashmir. Indeed, the very fact that this is a significant source of conflict serves to illustrate how usual it is to have unsettled authority over any particular territorial space.

20. THE CONCEPT OF LAW 217 (1st ed. 1961).

21. Bradley & Kelley, *supra* note 10, at 3.

international body, the state is subsequently bound by the decisions and actions taken by that body. Hence, the argument continues, the state sacrifices independence.

There is a significant flaw with this argument, however: It ignores the consensual nature of delegation. The “grant of authority” that creates a delegation is based upon the longstanding principle of sovereign consent—the idea that international law that binds states “emanate[s] from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.”<sup>22</sup> This principle of sovereign consent continues as a central principle of international law. The international agreements that states enter when they grant authority to an international body thus require explicit state consent. Indeed, modern international law leaves even the specific requirements for ratification to domestic authorities to decide, requiring only that the state’s authorized representative express the state’s consent.<sup>23</sup>

Even more important than the initial consent to international delegations is the conditional nature of nearly all such delegations. In most international delegations, states retain the power to revoke authority after it has been granted. As a consequence, states remain free from external control in any meaningful sense, for they are controlled by the decisions of the international body only so long as they agree to be. Once their agreement ceases, the control over them ceases as well.

It is surprising, then, that in the extensive discussions of the clash between international delegation and state sovereignty there has been relatively little discussion of the role of consent—of whether states have control over the decision to delegate authority and when they have the power to monitor and to revoke that authority. If international delegations exist only when domestic lawmaking authorities say they do, then international delegations are not best understood as contrary to legitimate domestic authority; they are instead better understood as another site through which that authority is expressed.<sup>24</sup> State consent to international law thus holds out the promise of reconciling international delegation and state sovereignty, transforming them into allies rather than opponents.

And yet, this does not eliminate all concerns. Even though consent is usually present, there remain potential, sometimes unavoidable, conflicts between

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22. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

23. See United Nations Vienna Convention on the Law of Treaties arts. 11–17, May 23, 1969, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980), *available at* [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (last visited Sept. 3, 2007) [hereinafter Vienna Convention on the Law of Treaties].

24. To take just one example, when a state joins the World Trade Organization, it retains the power to withdraw from the Organization. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization] art. XV, ¶ 1, Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter Agreement Establishing the WTO]. In these circumstances, it is wrong to say that member states have suffered from a meaningful loss of state sovereignty, for states retain the power to revoke that authority.

international delegations and state sovereignty. These points of tension can best be explored by considering a series of questions that are raised by acts of delegation.<sup>25</sup> First, who consents to the delegation? Second, what happens when preferences change? Third, what happens when the delegated authority extends its reach beyond the scope originally granted? Fourth, what if consent is the result of asymmetric power?<sup>26</sup>

### A. Consent by Whom?

Under the principle of sovereign consent, a state can be required to follow the rules that an international agreement lays out only if it has voluntarily agreed to be bound.<sup>27</sup> This is an important fact for international delegation, because delegations are all made by international agreement. Thus the power to accept or reject an international agreement is the power to accept or reject a delegation of authority. Yet this argument rests on an assumption that the body that is bound (the “state”) is the same as that which consents. But this assumption is called into some question on closer inspection of *who* is consenting.

Political scientists have often talked of states as “rational unitary actors” who act in a purposeful way to achieve self-interested goals. Legal scholars, too, frequently think of states as unitary actors—at least in the context of treaty ratification—perhaps in part because international law in fact has its origins in private contracts between individual princes.<sup>28</sup> In this view, then, state “consent” to a treaty could be treated much like a contract between individuals.

The idea of consent is much more complicated, however, when we acknowledge that states are not, in fact, unitary actors. Decisions to ratify (formally consent to) treaties and the regimes that they create are the end result of domestic politics, which involves filtering often-conflicting interests of

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25. Bradley & Kelley, *supra* note 10, at 2–4.

26. Were this article focused on international law more broadly, it would need to include a fifth category: when consent is not required. Customary international law does not rest on express state consent as does international treaty law. I am aware of no delegations, however, that are made through customary international law.

27. For more on the broader topic of the voluntary nature of treaties, see Oona A. Hathaway, *Between Power and Principle*, 72 U. CHI. L. REV. 469 (2005). See also Vienna Convention on the Law of Treaties art. 34 (“A treaty does not create either obligations or rights for a third State without its consent.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, introductory note, at 18 (1987) (“Modern international law is rooted in acceptance by states which constitute the system.”); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 28 (1995) (“For treaties, consent is essential. No treaty, old or new, whatever its character or subject, is binding on a state unless it has consented to it.”).

28. See WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 196 (Michael Byers trans., Walter de Gruyter 2000) (discussing treaty-making among sovereigns in the Middle Ages). In the earliest years of international law, treaties were considered to be private contracts between the signatory princes. The princes represented only themselves and not an abstract “state.” Hence the law that applied to private contracts applied to treaties. Christian Baldus, *The Roman Peace Treaty, in PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE* 103, 113–17 (Randall Lesaffer ed., 2004). This continued until around 1540, when the concept of the internal sovereignty of the state apparently began to emerge.

multiple actors through domestic political institutions.<sup>29</sup> Hence, the decision to ratify a treaty that delegates authority may have the support of only some—possibly even a minority—of citizens of the state.

The same can be said, of course, of domestic legislation. It is a necessary fact of lawmaking that some will support the result and some will not. The likelihood that legislation will be supported by only a minority of the population of course depends in significant part on the composition of the government, the lawmaking process, and how accurately it reflects the will of the governed. In even the most democratic of states, it is possible—maybe even inevitable—that laws will be made that have the support of only a fraction of the citizenry. The fact that international law is likely to have less than complete support among the citizenry thus cannot, by itself, serve as a special reason for questioning international law's legitimacy and is, in any case, not relevant to the central focus here: the tension between international law and states' sovereignty. The sovereigntist challenge to international law arises instead from the fact that a treaty need not have the support of the political actors who are ordinarily empowered to make domestic legislation, because the process of ratifying treaties may be different from that for creating ordinary legislation. It is this difference that has the potential to generate tension between domestic authority and international law even in the face of state consent.

International law provides that to bind itself to a treaty agreement, a state need only ratify it. The specific requirements for ratification are determined by domestic law and hence vary across states.<sup>30</sup> Some, for example, require that the chief executive officer's agreement is sufficient for a treaty to be ratified, others require that the treaty be approved through the same process used to pass regular legislation, and still others adopt some process in between. The United States falls in the middle of the two extremes: the Constitution calls for the President to submit a treaty to the Senate, which then must approve it by an affirmative vote of two-thirds of its members.<sup>31</sup> More important, the United States provides for a ratification process that differs in significant ways from its

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29. In my view, state behavior is the end result of a contest for control by multiple political actors within the state, mediated by domestic political institutions. This perspective is most closely identified with what political scientists would call "liberal institutionalism." For overviews of this approach from the political-science and legal perspectives, respectively, see Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000); see also Peter Alexis Gourevitch, *Squaring the Circle: The Domestic Sources of International Cooperation*, 50 INT'L ORG. 349 (1996).

30. See Vienna Convention on the Law of Treaties arts. 11–17.

31. U.S. CONST. art. II, §2, cl. 2. Compared to the ratification processes specified in every existing national constitution in the world, the U.S. system—in which the House is involved in making federal statutes but not in treaty-making—is unusual. See Oona A. Hathaway, *The Domestic Political Foundations of International Law: Codebook* (2007) (unpublished manuscript, on file with author); see also PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994).

process for passing ordinary legislation.<sup>32</sup> Indeed, the ratification process excludes the House of Representatives entirely from the treaty-making process.<sup>33</sup> Even more distinct from the normal lawmaking process—though more restricted in their use—are sole executive agreements, which exclude Congress altogether.<sup>34</sup>

When domestic actors choose a process for ratifying treaties that differs in important ways from the process used to pass ordinary legislation (as does the United States), international law might be used as an end-run around the domestic political process. If the two political processes differ, government actors might use international law to gain leverage over domestic policy choices. This type of two-level game is particularly likely to occur when the government actors who have influence or control over international law are different in their policy positions and goals from those who have influence or control over domestic law. Furthermore, these efforts can be expected to be more pronounced in cases in which control of government by one party is tenuous and, hence, those currently in control of foreign policymaking seek to delegate authority to an international body in order to constrain their successors. For example, research shows that as the number of government actors who can stop legislation (known in political science as “veto players”) increases, states become more likely to seek agreements with the International Monetary Fund (IMF) that “force” actors to make policy changes.<sup>35</sup>

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32. This is all the more distinctive because the United States also makes international treaties part of the supreme law of the land, meaning that they are treated as self-executing unless specified otherwise. For more on self-executing treaties, see Bradley, *supra* note 6 (considering the constitutional implications of U.S. international delegation); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (discussing the legal effects of international treaties on individual constitutional rights); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002) (analyzing the modern doctrine of non-self-executing treaties and the balance between conflicting rules of law and the separation of powers principle); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992) (surveying the rights of individuals under international treaties).

33. Indeed, the United States is unusual among democracies in its exclusion of part of the legislative apparatus from the decision to ratify treaties. In the vast majority of states, the process used to ratify treaties is functionally equivalent to that used for passing legislation. Hathaway, *supra* note 31.

34. Congressional-executive agreements, by contrast, require a majority vote in each house of Congress, just as does ordinary federal legislation (hence, they avoid many of the problems outlined here). There are questions, however, about whether congressional-executive agreements are an adequate constitutional substitute for the advice and consent of the Senate required by the Constitution. The debate is discussed in depth in BRUCE ACKERMAN & DAVID GOLOVE, *IS NAFTA CONSTITUTIONAL?* (1995).

35. See James Raymond Vreeland, *Why Do Governments and the IMF Enter Into Agreements? Statistically Selected Cases*, 24 INT'L POL. SCI. REV. 321 (2003) (arguing that as the number of veto players increases, executives are more likely to turn to IMF agreements); James R. Vreeland, *Institutional Determinants of IMF Agreements* (UCLA Int'l Inst., Global Fellows Working Papers (2004)), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1004&context=international> (last visited Sept. 3, 2007) (contending that governments that are more constrained domestically often seek to use IMF agreements to push through unpopular policies that would otherwise be impossible to achieve). For related arguments, see MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 13 (1988) (putting forward a “boomerang” model of international politics); Luigi Spaventa, *Two Letters of Intent*, in *IMF CONDITIONALITY* 441, 463 (John Williamson ed., 1983) (arguing that IMF demands allowed the Italian government and Italian unions to

Even when there is no difference in the *actors* who are engaged in international and domestic lawmaking, there may still be differences among the lawmaking *processes* that allow some government actors to achieve policy aims that might otherwise be unattainable. By their very nature, multilateral agreements do not permit line-by-line negotiation of the law.<sup>36</sup> Unlike standard legislation, therefore, domestic legislatures must take or leave a pre-formed package. Bilateral agreements are more amenable to specific negotiation. Even then, however, legislators have less control over the final shape of the law than they ordinarily do over domestic legislation, because it is necessary to gain the assent not only of all the relevant domestic actors, but also of another country's representative (who must respond to her own domestic constituencies).<sup>37</sup>

It is sometimes possible, in other words, for a subset of domestic political actors to use consensual international law to achieve policy goals that it cannot achieve through domestic politics—delegating authority to an international body or group of states that will in turn impose policies on the state that the domestic government never could or never would.<sup>38</sup>

This concern can be mitigated, however, without putting an end to international delegations. Individual states can address the problem by

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force their constituencies to accept unpopular, but necessary, fiscal programs to help turn around Italy's economic recession in the mid-1970s); Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881, 911 (1978) ("The international system is not only a consequence of domestic politics and structures but a cause of them."); Moravcsik, *supra* note 9, at 226 ("[I]nternational institutional commitments, like domestic institutional commitments, are self-interested means of 'locking in' particular preferred domestic policies . . . in the face of future political uncertainty."); Putnam, *supra* note 5, at 457 ("[Governments exploit] IMF pressure to facilitate policy moves that [are] otherwise infeasible internally.").

36. In many cases, states may enter Reservations, Understandings, and Declarations (RUDs)—which, in effect, permit states a limited line-item veto. See Vienna Convention on the Law of Treaties art. 19; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 100–30 (2000). RUDs are subject to abuse, as they are much less visible and less well understood than treaty ratification. Hence a state may ratify a treaty in order to obtain the benefits of membership, and then issue RUDs that make that commitment unenforceable. In fact, the United States did just that in the cases of the United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976), available at <http://www.ohchr.org/english/law/pdf/ccpr.pdf>, and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987), available at <http://www.ohchr.org/english/law/pdf/cat.pdf>. To avoid these problems, some multilateral agreements prohibit or restrict the use of RUDs. See, e.g., Agreement Establishing the World Trade Organization art. XVI, para. 5 ("No reservations may be made in respect of any provisions of this Agreement. Reservations . . . of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements.").

37. There are two other potentially important differences between international and domestic lawmaking. First, in international lawmaking, the president generally has the origination power, whereas in domestic lawmaking, the origination power generally rests with the legislative branch. Second, some states permit executives to enter into congressional-executive agreements or sole executive agreements with other states—agreements that in some cases extend beyond the usual scope for unilateral executive authority and hence give the executive greater lawmaking power than in the domestic context.

38. For example, Steve Charnovitz argues that "trade negotiations are . . . used to effectuate domestic policy reform," specifically citing the example of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs agreement). See Steve Charnovitz, *Patent Harmonization under World Trade Rules*, 1 J. WORLD INTELL. PROP. 127, 133 (1998).

narrowing the differences between their international and domestic lawmaking processes. In the United States, that would mean concluding more international agreements (hence making more international delegations) through the procedure for congressional–executive agreements (which requires passage by a majority of both houses of Congress, as does domestic legislation) rather than through the Article II treaty process (which, as noted above, requires a two-thirds vote in the Senate alone). This would make it significantly more difficult for political actors to use international law as an end-run around domestic lawmaking processes. It would also bring the country into better alignment with international practice, for very few states have systems for making international and domestic laws that are as different as are those of the United States.<sup>39</sup>

Opening the black box of the state and asking who consents to an international delegation considerably complicates the simple story of consent with which this Part began. In some cases, domestic actors might use international delegation to harness the power of international bodies to press policies that might not receive support from domestic legal and political institutions. In some cases, the differences between domestic and international lawmaking might mean that even wholly consensual delegations lie in some tension with state sovereignty.<sup>40</sup> This tension, however, is a product not of international law, but of the domestic rules of individual states that govern international and domestic lawmaking. Hence, state sovereignty can be effectively protected by revising these rules rather than by relinquishing the tool of international delegation.

## B. Time-Inconsistent Preferences

There is a second and related difficulty with treating “state consent” to international delegation as the central answer to concerns about how delegation might undermine domestic authority. States are not only made up of multiple actors who may have different preferences from one another. They are also made up of a shifting constellation of actors who may individually and collectively have different preferences *across time*. Political leaders may simply change their preferences, perhaps due to new information or a change in circumstances. Even more important, many fundamental facts about a state are subject to change over time—the political leaders might be replaced by leaders

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39. For a detailed argument for this change, see Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* (forthcoming 2008) (on file with author). See also ACKERMAN & GOLOVE, *supra* note 34; U.S. Department of State, Circular 175 Procedure, available at <http://www.state.gov/s//treaty/c175/> (last visited Aug. 31, 2007) (discussing the Circular 175 Procedure, which “refers to regulations developed by the State Department to ensure the proper exercise of the treaty-making power”).

40. As discussed in brief below, one might argue that such restrictions on domestic authority are a good thing, either because they allow more efficient outcomes or because they protect other values. This might be particularly true if the domestic government is not democratic and hence does not pursue the citizenry’s interests.

who hold entirely inconsistent views, and even the entire political structure can be replaced.

In the earliest international legal agreements, time-inconsistent preferences of states could be more easily addressed than they can today. In many cases, agreements between rulers were seen as essentially private agreements that bound only those individuals who signed them.<sup>41</sup> Hence, the “law” that they created had the potential to shift markedly with each change in ruler. While that had significant drawbacks, it did mean that new regimes were less encumbered by decisions they did not themselves make. But that is no longer true. Changes in government, no matter how radical they may be (for example, from autocracy to democracy) and no matter how they are accomplished (by legal or violent means), do not affect the legal obligations of the state.<sup>42</sup> Only the absorption of the state into another or the dissolution of the state into separate entities can override the principle of continuity.<sup>43</sup>

This strong principle of continuity is clearly essential to international law in general and international delegations in particular. Were governments unable to bind their future selves or their direct successors, then international agreements would be rendered nearly useless. A central reason for an agreement, after all, is to create a commitment now to do something in the future that the state might otherwise not choose to do. The ability of the state to commit its future self allows others to rely on that commitment and to engage in coordinated or cooperative activity premised on the expectation of continued obedience by other parties to the agreement. Consider, for example, an agreement that establishes the border between two states. With an agreement in

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41. See Randall Lesaffer, *The Grotian Tradition Revisited: Change and Continuity in the History of International Law*, in 73 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 103, 118 (2002) (discussing how successors were bound to treaties in the Spanish Age of international law, circa 1450–1648).

42. See, e.g., D. P. O’CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 3–8 (1967) (discussing the relationship between state succession and continuity of states); Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT’L L. 253 (1993) (arguing that new governments should continue to abide by treaties signed by old governments).

43. O’CONNELL, *supra* note 42, at 3–8. Even then the new states may choose to accept all the legal obligations of the original parent state, as, for example, Serbia did in the wake of the breakup of Yugoslavia. There are, however, some exceptions to the general rule that a change in state personality dissolves prior commitments. For example, Menno T. Kamminga states that

[t]he International Committee of the Red Cross (ICRC) has also long taken the view that a successor state is automatically bound by the international humanitarian instruments that were binding on the predecessor state, unless the successor state has made a specific declaration to the contrary. In practice, however, the ICRC has encouraged successor States to formally confirm their adherence to these instruments and, where successor States insisted upon acceding rather than succeeding to the Geneva Conventions and their Protocols, the ICRC has not objected.

*State Succession in Respect of Human Right Treaties*, 7 EUR. J. INT’L L. 469, 473–74 (1996). Similarly, the Human Rights Committee, which monitors the International Covenant on Civil and Political Rights, has declared that “all the peoples within the territory of a former State party to the Covenant remained entitled to the guarantees of the Covenant.” UN Human Rights Comm., *Human Rights Comm. Annual Report to the U.N. Gen. Assembly*, ¶ 49, UN Doc. A/49/40 (1994), available at <http://www1.umn.edu/humanrts/hrcommittee/hrc-annual194.htm> (last visited Sept. 3, 2007). For more on succession in the context of human-rights treaties, see Kamminga, *supra*.

place, a state need not maintain a significant military presence to protect the area from foreign intrusion, and the state and its citizens can engage in investments in infrastructure, buildings, and the like without fear of usurpation. None of this would be possible if the states that are parties to the agreement were not committed to abide by the agreement, regardless of their preferences later in time.

Nonetheless, the principle of continuity gives rise to problems for the concept of state consent. An international agreement permits the current domestic political actors to bind their future counterparts. That may be unproblematic when the government remains consistent over time. Yet it can be harder to defend when a government undergoes a significant change. Since 1960, for example, the 187 states that presently have some form of constitutional regime have adopted entirely new constitutions (not simply minor amendments) a total of 261 times.<sup>44</sup> In addition, since 1945, forty-nine countries have experienced considerable short-term improvements in democracy and many more have experienced significant longer-term improvements.<sup>45</sup> Such shifts can create circumstances in which the state that is bound by an international agreement is importantly different from the state that consented to the agreement in the first place. This problem is all the more pressing when an agreement calls for the state to delegate authority to an international body, for in those cases a state is not only obligated to abide by an agreed standard of conduct, but by rules and regulations made by the body to which authority has been delegated.

In such cases, the principle of continuity might permit a government that represented a small subset of the population to not only bind the population living under its rule, but also project its control forward in time to bind the country in the future. Even when there has been less radical change—one party loses control and another gains it—there may be similar concerns. If the reason for the change in party is a rejection by the population of the views of the old party, then permitting the old party to effectively retain power through previously made international delegations seems once again to frustrate popular control.

Again, this problem is not limited to the international-law context. The same dilemma faces domestic laws enacted by a prior government. Constitutions, in general, can be understood as self-binding mechanisms intended to provide some shelter from the turbulent winds of social and political change. After all, the U.S. Constitution sometimes requires unelected judges and elected officials to defy the popular will to do what they believe the U.S. Constitution requires. This gives rise to the well-known anti-majoritarian

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44. Author's calculations, based on the dataset described in Hathaway, *supra* note 31.

45. More specifically, forty-nine countries experienced at least a three-point, one-year improvement in the ten-point "democracy" scale from Polity. There were 172 instances in which states' democracy scores increased by at least one point—often for several years in a row. Author's calculations, based on the Polity Dataset.

(or counter-majoritarian) difficulty: How can decisions to defy the popular will be legitimate in a nation that traces its power to the people's will? As Laurence Tribe succinctly puts it,

[i]n its most basic form, the question in such cases is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change.<sup>46</sup>

Most who have considered such questions conclude that the answer to the puzzle must be that such self-imposed constraints allow the nation to achieve ends closer to the true popular will over the long term than would be possible were the polity not constitutionally constrained—a point discussed in more detail below.<sup>47</sup>

The claim that constitutional constraints give rise in the long term to governance that reflects the true will of the people rests on a series of assumptions—among them that it is possible for representative processes to ever in fact meaningfully reflect majority will, and that the constitutional constraints can succeed in checking momentary whims and, at the same time, not excessively inhibit change and thus produce stagnation. The latter assumption rests on a claim that the constitutional regime strikes the right balance—resisting and permitting change in correct measure. Most domestic legal systems, therefore, do not prohibit changes to higher law. They instead address the problem of time-inconsistent preferences by providing that the domestic laws remain binding unless and until those laws are formally revoked or changed. The process required to change the laws may be more or less cumbersome depending on how resistant to change they are intended to be—that is, how securely the nation wishes to bind itself.

The majority of treaties adopt a similar solution: States retain the authority to revoke power that has been delegated to an international institution through a treaty, either by denouncing or by withdrawing from the relevant treaty.<sup>48</sup> The treaty may be very easy to denounce or may include any number of hurdles,

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46. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 10 (2d ed. 1988).

47. See discussion *supra* Part III.A. Tribe argues that this remains an important puzzle of constitutional theory, but suggests that the “outlines of an answer” can come from studying impulse control. He cites a study that suggests that even pigeons are capable of acting to “bind their ‘own future freedom of choice’ in order to reap the rewards of acting in ways that would elude them under the pressures of the moment.” *Id.* at 11. Jon Elster considers similar questions and arrives at a similar conclusion. He argues that “inconsistent time preferences” arise in part from “weakness of will”—that is, the tendency to privilege the present over the future. This weakness of will leads individuals to act in ways that later give rise to regret. A rational response to such irrational impulses, Elster argues, is for an individual to seek to bind its later self—that is, to adopt the “Ulysses strategy.” JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 65–76 (1979).

48. The majority of treaties include provisions for withdrawal in the treaty text itself. Those that do not are generally considered to be governed by Article 56 of the Vienna Convention on the Law of Treaties, which applies to treaties completed after 1980. For more on treaty exit and the related decision to “unsign” a treaty, see Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2002). Bradley and Kelley discuss the related issue of “permanence” of the delegation. Bradley & Kelley, *supra* note 10, at 20–24.

including time restrictions or specific consent requirements.<sup>49</sup> Even when exit is entirely unrestricted, reputational concerns may nonetheless keep states from withdrawing, even if they no longer support the treaty. (Consider, for example, the international uproar that followed the United States' decision to "unsign" the Rome Statute of the International Criminal Court.)<sup>50</sup>

Finally, some treaties create obligations that are not just difficult, but are impossible for states to escape. Treaties that prohibit unilateral exit or withdrawal are uncommon, but they do exist.<sup>51</sup> A particularly notable example is the United Nations (UN) Charter, which does not contain any provision on exit and is generally (though not universally) regarded as an irrevocable treaty.<sup>52</sup> Indeed, the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) adopts a default rule providing that states may not unilaterally exit from a treaty that does not explicitly provide for denunciation or withdrawal.<sup>53</sup> Under the Vienna Convention, even a fundamental change in circumstances cannot be invoked as grounds for withdrawing from or terminating a treaty, except in very limited circumstances.<sup>54</sup> These provisions stand in tension with the principle of state sovereignty, which is no doubt why they are so rare.<sup>55</sup>

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49. Helfer, examining the United Nations Office of Legal Affairs Handbook of Final Clauses, identifies six types of denunciation and withdrawal clauses:

- (1) treaties that may be denounced at any time; (2) treaties that preclude denunciation for a fixed number of years, calculated either from the date the agreement enters into force or from the date of ratification by the state; (3) treaties that permit denunciation only at fixed time intervals; (4) treaties that may be denounced only on a single occasion, identified either by time period or upon the occurrence of a particular event; (5) treaties whose denunciation occurs automatically upon the state's ratification of a subsequently-negotiated agreement; and (6) treaties that are silent as to denunciation or withdrawal.

*Supra* note 48, at 1597.

50. Todd S. Purdum, *A Wider Atlantic: Europe Sees a Grotesque U.S.*, N.Y. TIMES, May 16, 2002, at A3.

51. There is no comprehensive data currently available on the number of treaties that include the various types of exit provisions. In the human-rights area, Larry Helfer identifies only four treaties that do not contain denunciation clauses. *See id.* at 1642 n.172. Helfer also notes that "[t]reaties that expressly preclude unilateral exit are uncommon." *Id.* at 1593 n.31.

52. *See* Kelvin Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, in 53 BRITISH YEARBOOK OF INTERNATIONAL LAW 83, 99–100 (1982) (discussing the lack of withdrawal provisions in the UN Charter and stating that only one country has made a partial attempt to withdraw); Egon Schwelb, *Withdrawal from the United Nations: The Indonesian Intermezzo*, 61 AM. J. INT'L L. 661, 671 (1967) (discussing Indonesia's withdrawal attempt and stating, "Members of the United Nations have the right to withdraw . . . but only in . . . exceptional circumstances"); Joseph H.H. Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, 20 ISRAEL L. REV. 282 (1985) (discussing withdrawal from the European Economic Community).

53. One of the best modern discussions of the topic is Laurence R. Helfer, *supra* note 48. For earlier works on the topic, see Widdows, *supra* note 52; Schwelb, *supra* note 52, at 671; Weiler, *supra* note 52.

54. Vienna Convention on the Law of Treaties art. 62. Specifically, the Vienna Convention states, "A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."

States may deal with the problem of time-inconsistent preferences in a variety of ways. They can ameliorate it in significant part by ensuring that delegations are revocable. A treaty need not permit costless revocation to address sovereignty concerns, but it must allow states to revoke the delegation so that major changes in public opinion or in the circumstances underlying the international delegation can be addressed. Individual states might insist on including a withdrawal clause in treaties before they accede. They might, moreover, choose to make agreements informally rather than formally, for informal agreements tend to be more flexible.<sup>56</sup>

Addressing the problem of time-inconsistent preferences after the fact is more difficult, but not impossible. States might seek to renegotiate the earlier agreement to address new concerns. When renegotiation is not possible, states face the decision whether to violate their international legal commitments and accept the significant consequences that might follow—both those specifically provided in the agreement and the more general sanctions that can attend state violations of a legitimate international legal obligation (as well as the harm to the principle of *pacta sunt servanda*<sup>57</sup> that undergirds the international legal system). Where states have delegated authority, they might simply cease to recognize or follow the decisions of the international institution. Most states, in fact, allow some form of subsequent modification of international law's domestic effect, even when doing so might place the state in violation of international law. In the United States, for example, Congress can pass legislation that implements, modifies, or even contradicts a treaty obligation. Such legislation, the courts have ruled, always takes precedence over the treaty itself.<sup>58</sup> This hands Congress an immense power to shape the domestic effect of a

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*Id.*

55. This remains a matter of debate. *See* Helfer, *supra* note 48, and Widdows, *supra* note 52.

56. Informal agreements tend to be more subject to renegotiation after the fact than are formal written agreements. *See, e.g.,* Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991) (discussing informal agreements in general). That very flexibility, however, can be a drawback as well, for all the reasons discussed above.

57. Latin phrase meaning "agreements must be kept." BLACK'S LAW DICTIONARY 1140 (8th ed. 2004).

58. *See, e.g.,* *Medellin v. Dretke*, 544 U.S. 660, 677 (2005) (per curiam) ("[W]herever the Convention, which has been in continuous force since 1969, conflicts with this subsequently enacted statute, the statute must govern."); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) ("We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion))); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that when an act of legislation conflicts with the self-executing provisions of a treaty, "the one last in date will control the other"); Curtis Bradley & Lori Fisler Damrosch, *Medellin v. Dretke: Federalism and International Law*, 43 COLUM. J. TRANSNAT'L L. 667, 680 (2004–2005) (calling the doctrine of the relationship between statutes and treaties that gives subsequently enacted statutes precedence "well-settled"); Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005) (arguing that federal statutes should govern when enacted after the adoption of a treaty). The enactment of subsequent contrary legislation may very well leave the country in violation of international law, but that law would be unenforceable in domestic courts. In order for the treaty to no longer be binding according to international law, the

treaty commitment even after it has been made and even if international law does not permit unilateral change or revocation. Again, however, these enactments affect only the domestic legal effect of the international commitment. Despite the new law revoking the power of the treaty—and of the international organization that oversees it—within the state, the law may nonetheless remain binding as a matter of international law, and the failure to abide by it might bring consequences in the form of reciprocal defection and retaliation by other states or enforcement through international organizations.

In sum, the time-inconsistent preferences of political actors over time can mean that state consent to international delegation is more problematic than it might at first appear. This problem is a narrow one—and can be largely averted if the agreements that create delegations provide withdrawal procedures—but is real nonetheless.

### C. Unintended Consequences

When a state grants authority to an international body to take action or make decisions, that consent rests on a certain expectation of what the international body will do with the authority granted to it. But once the authority has been given away, states inevitably lose some control over the exercise of it. Hence, the authority states mean to delegate to an international body can sometimes differ from the authority later exercised by that same international body. This might be called the problem of unintended consequences of delegation.<sup>59</sup> The existence of such unintended consequences is perhaps the single most salient reason for the tension between international delegation and state sovereignty.

A particularly notable example of unintended consequences of international delegation is the European Community (EC). Alec Stone Sweet and Thomas Brunell argue that the transformation of the European Community from an organization of sovereign states governed by international law into a “multi-tiered system of governance founded on higher-law constitutionalism” was unanticipated—indeed even opposed—by many member states. They argue that the European Court of Justice (ECJ) “constitutionalized” Europe through what can only be seen as judicial fiat, by expanding the zone of its own discretion over time. It did so most notably by ruling that in any conflict

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country must formally withdraw from it. For more on treaty withdrawal, see sources cited *supra* note 53.

59. This concept of unintended consequences is related to principal-agent slack, which has been extensively explored by political scientists and legal scholars in the areas of legislative and judicial decisionmaking. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1206 (1990–1991); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432–37 (1986–1987); William R. Dougan & Michael C. Munger, *The Rationality of Ideology*, 32 J.L. & ECON. 119 (1989); Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103 (1990); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); John McArthur & Stephen V. Marks, *Constituent Interest vs. Legislator Ideology: The Role of Political Opportunity Cost*, 26 ECON. INQUIRY 461 (1988).

between EC and national law, EC law must be given primacy (a principle now referred to as the doctrine of “supremacy”), and that the EC confers legal rights on individuals that national governments must respect, and which can be pleaded, and must be enforced, in national courts (a principle now referred to as the doctrine of “direct effect”). Neither principle, Sweet and Brunell emphasize, was provided in the treaty that created the EC.<sup>60</sup> States, in other words, created the European Community and the ECJ and delegated authority to them. They did not anticipate that the ECJ would seize the opportunity to reinterpret its mandate to expand its authority in ways not sanctioned or approved by the member states.

The existence of “unratified treaty amendments” has a similar effect. As Curtis Bradley explains, unratified treaty amendments are “changes to treaties proposed by international bodies that become binding upon parties to the treaty without the expectation of a national act of ratification.”<sup>61</sup> Treaties that include such procedures might open the door to unintended consequences because the procedures delegate to an international organization the power to modify the treaty’s obligations without the approval of all of the state parties. The amendments may simply be tacit—changes that a state can prevent by objecting. Others, however, can take place even over a state’s objection. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer provides that the annexes, which specify which substances are to be controlled and by how much, can be amended by a vote of two-thirds of the members and will bind all members, including those who oppose the changes.<sup>62</sup> This process has the potential to lead to unanticipated changes in the states’ legal obligations—changes over which they may have little control.<sup>63</sup>

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60. Alec Stone Sweet and Thomas Brunell write, “It cannot be stressed enough that the Court initiated and sustained this process in the absence of express authorization of the Treaty, and despite the declared opposition of Member State governments.” *Constructing a Supranational Constitution, in THE JUDICIAL CONSTRUCTION OF EUROPE* 45, 66 (2004). Some disagree with this interpretation of events. See, e.g., ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATES POWER FROM MESSINA TO MAASTRICHT* 472 (1998) (arguing that “European integration was a series of rational adaptations by national leaders to constraints and opportunities stemming from the evolution of an interdependent world economy, the relative power of states in the international system, and the potential for international institutions to bolster the credibility of interstate commitments”). For more on the European transformation, see also KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001).

61. Curtis Bradley, *Unratified Treaty Amendments and Constitutional Process* 1 (Feb. 6, 2006) (unpublished workshop paper), available at <http://www.law.duke.edu/publiclaw/pdf/workshop06sp/bradleyc.pdf>.

62. United National Environment Programme, *Montreal Protocol on Substances that Deplete the Ozone Layer* art. 2 ¶ 9(d), art. 10 ¶ 9, available at <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

63. The unratified treaty amendments can also raise the type of problem discussed in the first subsection above (“Consent by Whom”). Bradley argues that unratified treaty amendments that allow the executive greater, sole control over the amendment process arguably delegate unconstitutional powers to the executive. More important, for the purposes of this paper, they create a lawmaking process that differs in important ways from the usual domestic lawmaking process. Bradley, *supra* note 61.

The World Trade Organization (WTO) offers yet another example of the way in which international delegation might generate unintended consequences. The WTO puts in place two mechanisms that allow for change in members' legal obligations over time. The first is the Dispute Settlement Body, which considers complaints filed by member states and then issues a decision. The Body has the power to make decisions that bind member states as a matter of international law; states must either follow the ruling or face sanctions.<sup>64</sup> This mechanism delegates to the WTO the power to resolve disputes between state parties over the meaning of the treaty obligations they share and, by doing so, to address ambiguities in the treaty.<sup>65</sup> In this way, the requirements of the treaty may evolve—or at least become more precise—over time, sometimes in ways states might not fully anticipate.<sup>66</sup>

The second mechanism for implementing change in the WTO regime is by altering the terms of the agreement. Here, states cede limited, but real, authority. Amendments are generally made by a two-thirds vote of the members (and amendments are usually only binding on those who accept them).<sup>67</sup> Modifications can be made outside the amendment process, however. Such changes formally require consensus of all members,<sup>68</sup> but informally the

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64. There is an ongoing debate as to whether a state that refuses to change its behavior as required by the Dispute Settlement Understanding and faces sanctions as a consequence is acting in compliance with the treaty. It is not necessary to resolve that question here. It is enough to notice that the WTO does not provide for any further method of compulsion. See Steve Charnovitz, *Recent Developments and Scholarship on WTO Enforcement Remedies*, in INTER-GOVERNMENTAL TRADE DISPUTE SETTLEMENT: MULTILATERAL AND REGIONAL APPROACHES 151 (Julio Lacarte & Jaime Granados, eds. 2004) (discussing recent enforcement mechanisms employed by the WTO). Compare Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002) (arguing that the WTO is a liability-rule system that promotes efficient breach), with John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109 (2004) (arguing that the WTO imposes a property rule with an obligation to perform) and Joost Pauwelyn, *How Strongly Should We Protect International Law?* 2 (Mar. 14, 2006) (unpublished manuscript) ("[I]nternational law is best protected on a sliding scale between strict inalienability and simple liability."), available at [http://eprints.law.duke.edu/archive/00001309/01/How\\_strongly\\_should\\_we\\_protect\\_and\\_enforce\\_IL.pdf](http://eprints.law.duke.edu/archive/00001309/01/How_strongly_should_we_protect_and_enforce_IL.pdf).

65. Put another way, state parties delegate to the WTO the power to decide whether they can use trade measures in response to violations of the WTO agreement.

66. See, e.g., Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate?: Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 LAW & CONTEMP. PROBS. 257 (Winter 2008) (arguing that members are often bound by decisions of the WTO's DSB, even when these decisions further policies that would not otherwise be supported in multilateral negotiations).

67. Article IX to the Agreement Establishing the World Trade Organization provides, "Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting." ¶ 1. Consensus is defined in the following way: "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting where the decision is taken, formally objects to the proposed decision." Art. IX ¶ 1 n.1.

68. The Agreement Establishing the World Trade Organization provides that most amendments be made by a two-thirds vote:

Amendments to provisions of this Agreement . . . of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the

process is often dominated by the most powerful members, leaving others with significantly less input and potentially subjecting them to changes they do not fully endorse.<sup>69</sup>

One response to the concern that delegation might lead to unintended consequences centers on the intention of the state at the time it delegates. Yes, the state might not anticipate—and hence intend—every individual decision that the international body to which authority is delegated might make. But those acting on behalf of the state intentionally accede to a process that they must realize will lead to an evolution in the state’s legal obligations over time. Indeed, one might argue that this is precisely what the state representatives desire when they delegate the authority to make future decisions to international bodies. They *want* to have future decisions taken out of the government’s hands (whether for reasons of efficiency, to isolate themselves from the political fallout that otherwise might flow to them, or to tie the hands of their successors); they *want* the institutions to grow and evolve; and they *want* the institutions to broaden and deepen the legal commitment they have made to one another. Hence, to argue that the particular decisions these processes produce are “unintended” misses the broader point: Specific effects might be unintended by state actors, but the possibility for independent action by those to whom state actors delegate is usually wholly intended.

There remains, nonetheless, the possibility that states could delegate authority to an international institution based on a particular set of expectations about what that institution will do, only to find that those expectations were wrong. In such cases, the presence of consent will not eliminate state-sovereignty concerns. The international body may make wildly different substantive decisions than expected (for example, adopting a new substance to be regulated or a phase-out schedule once considered unimaginable), or might assert powers never anticipated. (The ECJ’s doctrine of direct effect might fit this characterization.) Delegations of this type can thus create tension with state sovereignty because they usurp the state’s authority to govern itself.

Once again, this tension can be mitigated by states. To begin with, states could insist on conditional consent to delegations that might have unintended consequences. Once the delegation has been made, states may seek renegotiation of the treaty to eliminate an unintended consequence that has become apparent, or they might refuse to comply (albeit at some cost) with the terms of the renegotiated treaty. Permitting states to address unintended

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Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it . . . shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

Art. X ¶ 3.

69. See, e.g., Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339 (2002) (analyzing the decisionmaking processes in the GATT/WTO). For a detailed account of the process of changing WTO law, see Hunter Nottage & Thomas Sebastian, *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law*, 9 J. INT’L ECON. L. 989 (2006).

consequences after the fact through withdrawal or renegotiation makes it possible both to better protect state sovereignty and to ensure that delegations give rise to coordinated behavior that in fact serves the best interests of states. When states eschew these options—and instead choose to continue to participate in and comply with the regime—this offers some reason to think that the consequences may have been anticipated or are approved. Continued cooperation may also signal, however, that although there are sovereignty costs arising from the unintended consequences, the benefits of the international cooperation (or the reputational or other costs associated with withdrawal or noncompliance) outweigh the imposition on sovereignty.

When an international delegation leads to unintended consequences, the state's initial consent to the delegation does not by itself provide an adequate answer to concerns about the delegation's imposition on state sovereignty. Hence, states should identify and use the many tools available to them to mitigate this important concern.

#### D. Asymmetric Power

The final point that complicates states' consent to international delegation concerns the context in which the consent is given. I have argued here that the voluntary character of most international delegations greatly reduces the risk of "sovereignty costs" arising from them. Voluntariness, however, is not an either-or state. When there are significant asymmetries in power between the parties to an international delegation, the weaker party's consent may reflect the disproportionate influence of the stronger. The most familiar—and extreme—instances of such asymmetric power are found when consent to a delegation is coerced. Less obvious, but more common today, are delegations generated when states with unequal power enter agreements that one or more of them simply cannot afford to refuse.

Coerced agreements were once a significant problem for international law. Perhaps the most famous example comes from the mid-nineteenth century, when four U.S. naval vessels, commanded by Commodore Matthew Perry, sailed into Tokyo Bay in an effort force Japan to abandon two centuries of isolation.<sup>70</sup> The resulting convention signed at Kanagawa in March opened the ports of Japan to trade with the United States.<sup>71</sup>

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70. James Fallows, *After Centuries of Japanese Isolation, A Fateful Meeting of East and West*, SMITHSONIAN, July 1994, at 20. Commodore Perry's entrance into Tokyo Bay was such a dramatic act of diplomacy that it later became the centerpiece of Stephen Sondheim's musical *Pacific Overtures*.

71. Commodore Perry eventually went ashore for a tense meeting with Japanese officials, where he delivered a letter from President Millard Fillmore and promised to come back for an answer the following year with an even larger force. In February 1954, Commodore Perry made good on his promise, leading eight ships back into Tokyo Bay to begin negotiating. W.G. BEASLEY, *THE RISE OF MODERN JAPAN* 28–29 (1995). For a thorough discussion of Commodore Perry's efforts to open Japan, see PETER BOOTH WILEY WITH KOROGI ICHIRO, *YANKEES IN THE LAND OF THE GODS: COMMODORE PERRY AND THE OPENING OF JAPAN* (1990), especially chapters 9 & 12. For Commodore Perry's account, see *THE JAPAN EXPEDITION, 1852–1854: THE PERSONAL JOURNAL OF COMMODORE MATTHEW C. PERRY* (Roger Pineau ed., 1968).

Today, the threats are rarely so blatant. In fact, that kind of gunboat diplomacy is now illegal.<sup>72</sup> Yet while modern-day exercise of asymmetric power is vastly more subtle, it can sometimes be just as effective. Strong states, for example, might promise foreign aid or enhanced trade access in return for cooperative behavior, or they might threaten sanctions or withdrawal of aid in return for uncooperative behavior. For example, the United States has pressed more than one hundred countries into concluding agreements to shield U.S. citizens from the jurisdiction of the International Criminal Court (ICC).<sup>73</sup> States that refuse to enter these U.S.-demanded “Article 98” agreements (so named for Article 98 of the Rome Statute of the International Criminal Court,<sup>74</sup> which arguably authorizes such agreements) may be faced with withdrawal of U.S. military assistance and economic support.<sup>75</sup>

Some instances of asymmetric power feature no promises or threats of sanction but nonetheless raise questions about how freely consent is given. Instead of threatening to penalize a state for failing to join a treaty that delegates authority, an international body, state, or group of states might simply offer a deal that is too good to refuse. Today, when membership in the World Trade Organization brings with it access to the markets of 150 other states,<sup>76</sup> is membership in the WTO truly voluntary? Some might argue that it is virtually impossible for some states to choose to remain outside the regime; the benefits gained by joining it—and the benefits forgone by not joining it—are too high. Even more pernicious, some argue, are agreements that states join only to make the best of a bad situation: such states would prefer no international agreement at all, but once the agreement exists, they are better off joining to reduce the inevitable costs that the agreement imposes on them.

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72. Entered into force in 1980, the Vienna Convention on the Law of Treaties provides that a treaty is void if its conclusion has been procured by the “threat or use of force in violation of the principles of international law.” Art. 52. Hence today the Treaty of Peace and Amity between the United States and Japan, signed as it was under the shadow of a small armada of gunboats, would (and should) be void.

73. See Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Swaz., May 10, 2006, State Dep’t No. 06-253, 2006 WL 4464971; Press Statement, United States Department of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/45573.htm> (last visited Sept. 1, 2007).

74. UN Doc. A/CONF.183/9 (July 1998), reprinted in 37 I.L.M. 999 (1998), available at [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

75. Under the American Servicemembers’ Protection Act (ASPA), countries that belong to the ICC are not eligible for U.S. military assistance unless they are explicitly exempted in the ASPA legislation, the President waives the requirement for national-security reasons, or the President waives the requirement because the countries have concluded an Article 98 agreement with the United States. 22 U.S.C. §7424 (b)–(c) (2000). Similarly, under the “Nethercutt Amendment,” originally passed as part of the Fiscal Year 2005 Appropriations Bill, countries that belong to the ICC are not eligible for U.S. economic support funds unless they are statutorily exempted, the President waives the requirement for national-security reasons, or the President waives the requirement because the countries have concluded an Article 98 agreement with the United States. 2005 Consolidated Appropriations Act, Pub. L. No. 108–47, 117 Stat. 848.

76. World Trade Organization, Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Nov. 27, 2007) (showing 151 members).

Lloyd Gruber argues that this is exactly what happened to Mexico in the mid-1980s: the 1987 Canada–U.S. Free Trade Agreement fed concerns in Mexico that the lower trade barriers between Canada and the United States would affect Mexico’s ability to compete in the American market. Mexico responded by scrambling to be included in the deal—even though doing so would force it to make faster and more significant political and economic changes than its people or its government supported. Mexico thus entered the North American Free Trade Agreement (NAFTA) not because the agreement would make it better off, Gruber argues, but because staying outside the agreement would have left the country *worse off*.<sup>77</sup>

In all these cases, whether the delegation is insufficiently consensual depends in significant part on the nature of the threat faced by the state. Since Robert Nozick’s famous essay on the topic, most theorists have agreed that the making of a conditional threat is an essential factor in coercion.<sup>78</sup> Nozick argues that a coercive threat is one that moves the recipient of the threat from a baseline, which he defines as the “normal or natural or expected course of events.”<sup>79</sup> Building on Nozick’s approach, a majority of scholars have come to conclude that a proposal constitutes a threat if the proposer indicates that, if the demand is denied, the proposer will make the recipient worse off than the recipient ought to be.<sup>80</sup> A similar consideration arises out of private contract law: contracts are generally assumed to be consensual, and thus enforceable, unless a party can show that the agreement was induced by one party’s improper threat that gave the other party no reasonable alternative but to assent.<sup>81</sup>

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77. Lloyd Gruber, building on the work of Peter Bachrach and Morton Baratz, among others, makes perhaps the most sustained argument along these lines in his book, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* 95–167 (2000). Gruber’s claim that Mexico did not join NAFTA because it expected the agreement to make it better off than it would have been absent an agreement between Canada and the United States is highly contestable as an empirical matter. However, the accuracy of the example on this point does not matter as much as does the broader dynamic that it aims to illustrate.

78. Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440 (Sidney Morgenbesser, Patrick Suppes & Morton White eds., 1969). Some think, however, that this view is too restrictive and that conditional offers might also be considered coercive.

79. *Id.* at 447.

80. Whether the recipient is made worse off than it ought to be is in turn determined by examining whether the proposer proposes to violate the recipient’s rights if the proposal is denied. ALAN WERTHEIMER, *COERCION* 217–21 (1987). Some international agreements might be seen not simply as offers but as what some have called “thoffers”—proposals that make one better off than normal under one conditional, but worse off than normal under the alternative conditional. The term was coined by Hillel Steiner, *Individual Liberty*, *PROC. OF THE ARISTOTELIAN SOC’Y*, at 33, 39 (1975), and the concept was discussed more recently in MICHAEL TAYLOR, *COMMUNITY, ANARCHY, AND LIBERTY* 12 (1982). See also David Zimmerman, *Coercive Wage Offers*, 10 *PHIL. & PUB. AFF.* 121 (1981) (examining the phenomenon of “coercive offers”). Whether a thoffer is coercive or not depends again on whether the proposal constitutes a threat.

81. *RESTATEMENT (SECOND) OF CONTRACTS* § 175(1) (1979) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”). Of course, the exact bounds of this principle are far from clear. See John P. Dawson, *Economic Duress: An Essay in Perspective*, 45 *MICH. L. REV.* 253, 289 (1947) (“The history of generalization in this field offers no great encouragement for those who

Both the harder and the softer forms of asymmetric power constrain the choices available to states or otherwise influence their decision. Yet not all can be said to meaningfully undermine state consent and hence state sovereignty. At one end of the spectrum stands the threat wielded by Commodore Perry.<sup>82</sup> The proposal offered to the Japanese, most would agree, promised to make them worse off than they ought to be if they refused to cooperate. A delegation made under these conditions should not be—and is not—considered consensual.<sup>83</sup>

On the other hand, the indirect economic pressure of the kind allegedly faced by Mexico in the NAFTA negotiations does not constitute an improper threat. Mexico had no reasonable legal or moral claim to the status quo—it had no right, in other words, to prevent other countries from entering into agreements even if that agreement might indirectly harm Mexico. Indeed, few who care about state sovereignty would wish for a world in which Mexico could force the United States and Canada *not* to enter an agreement with one another simply because their agreement threatens to put Mexico at a competitive disadvantage.

States acting individually and collectively can address the problem of coercion in international delegations. International law already includes rules prohibiting coerced agreements, and these rules should be vigorously enforced. Moreover, states can act to minimize the problem both by refraining from making threatening proposals and by refusing to respond to attempts at improper persuasion.

The possibility of asymmetric power has the potential to complicate the simple story of consent that began this section. However, the reality of international delegation rarely involves such compromised consent that it undermines the sovereignty of the assenting state. It can be safely assumed that most states assent to most expressions of international law most of the time because they believe they are better off in doing so, sovereignty costs notwithstanding.

#### IV

##### THE OTHER SIDE OF THE EQUATION: THE BENEFITS OF INTERNATIONAL DELEGATION

I have argued that the tension between state sovereignty and international delegation is of much narrower scope than is generally assumed. When states

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seek to summarize results in a single formula.”); Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion* 33–38 (Univ. of Mich. John M. Olin Ctr. for Law and Econ. Research Paper No. 04-005, Mar. 3, 2004), available at <http://ssrn.com/abstract=512903>.

82. A proposal need not involve military pressure to constitute a threat. Today, national economies are highly intertwined and interdependent, hence the threat of coordinated economic sanctions can carry force just as surely as does a gun.

83. Many would not consider it a delegation at all, for the term “delegation” is generally reserved for voluntary acts by the delegating state.

consent to delegation, that delegation is often most accurately seen as an exercise of state sovereign power. Impositions on domestic authority structures do sometimes arise—when those who consent to international delegations are different from those who make domestic law, when there are time-inconsistent preferences or unintended consequences, and when consent is the result of asymmetric power. But these impositions are not nearly as large as critics assume.

All of the discussion thus far has focused only on the potential threats to state sovereignty posed by international delegation. The conflicts between state sovereignty and international delegation are admittedly real, but they are vastly overstated. Whatever their exact level—which can only be determined on a case-by-case basis—the fact remains that sovereignty costs represent only half the equation. On the other side of the ledger are the benefits that international delegations provide to states, benefits that can be substantial. Thus, it is important to ask not only when and why international delegation impinges on sovereignty, but also when and why international delegation is in a state's best interest *despite* this potential impingement.

The simple truth is that international delegation is sometimes the only way—or the least costly way—for states to achieve their goals, including maximizing their state power over the long term. Thus a country may cede authority over a decision or accept certain limits on its future action in order to, for example, project its ideology or constrain the actions of other states without using military force. A state may also accept restrictions on domestic authority in order to achieve ends that it shares with others who similarly restrict their own authority—that is, to coordinate or cooperate.

This is an instrumental argument in favor of international delegation. There is also a moral one: International delegation sometimes serves to protect individuals against actions that sovereign nations should not be permitted to take. Here, raw state interest takes a back seat to the broader interests of a state's citizenry, though in many cases state leaders believe strongly that states benefit from making these commitments.

#### A. The Instrumental Argument: Efficacy of the State

There is a paradox at the heart of international law. International law is founded on the idea that states are sovereign. And yet the very purpose of international law is to restrict the freedom of states to act as they (more specifically, those who govern them) wish. Of course, as already discussed at length, many of these restrictions arise out of state consent and hence cannot truly be said to undermine state sovereignty—or they do so only in the very narrow circumstances described above. Nonetheless, they do limit, in some way, the future behavior of the state and subject it to the authority of outside actors. How might this imposition on the state be justified?

One answer is that restrictions of the kind imposed by international law—and particularly international delegations—can be necessary to states' pursuit of

their true ends. Just as Ulysses bound himself to the mast to avoid the Sirens and return home safely, states bind themselves to international law in order to avoid short-term temptations and thereby achieve their longer-term goals. States are willing, in other words, to sacrifice some of their range of freedom to achieve goals that would be difficult or impossible for them to otherwise achieve.

The idea that imposing limits on future action can enhance, rather than restrict, freedom is certainly not limited to international law. Isaiah Berlin, for instance, speaks of positive liberty—the *freedom to* achieve certain ends—as opposed to negative liberty—the *freedom from* external coercion.<sup>84</sup> Freedom to achieve ultimate ends sometimes rests on forfeiting some degree of freedom from external constraint.<sup>85</sup> Jon Elster, too, speaks of human beings as distinct in that we are able to act as “globally maximizing machines”—capable of waiting and using indirect strategies, of deferring gratification to achieve longer-term ends. In particular, he writes that individuals may bind themselves as did Ulysses as a “way of resolving the problem of weakness of will; the main technique for achieving rationality by indirect means.”<sup>86</sup>

There is an entire school of international-relations theory devoted to making a similar claim. In the late 1970s and early 1980s, a new approach to international relations—later dubbed “institutionalism”<sup>87</sup>—emerged in response to realist claims that states could not both seek their self-interest and engage in meaningful international cooperation. Institutionalists argued instead that effective regimes (including treaty regimes) could emerge to allow countries to engage in cooperative activity by restraining short-term power maximization in pursuit of long-term goals.<sup>88</sup> States will create and comply with international

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84. Many have questioned whether this dichotomy is real or specious. Some argue that the two are indistinguishable in practice while others contend that one cannot exist without the other. (For example, it is commonly argued that preservation of negative liberty requires positive action by government to prevent some from taking the liberty of others.)

85. This, in turn, Berlin worried, opened the door to totalitarianism. He says,

Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture in the name, and on behalf, of their “real” selves, in the secure knowledge that whatever is the true goal of man . . . must be identical with his freedom.

ISAIAH BERLIN, *LIBERTY* 180 (1969). Philip Pettit, among others, attempts to overcome this problem by proposing a third conception of freedom, which he and others dub “republican freedom.” See PHILIP PETTIT, *REPUBLICANISM* (1997) (arguing for a theory of freedom as “non-domination,” with domination distinct in important ways from interference).

86. ELSTER, *supra* note 47, at 37.

87. This school of thought has been variously recast as “modified structural realism,” “intergovernmental institutionalism,” “neoliberal institutionalism,” and “new institutionalism.” See OONA A. HATHAWAY & HAROLD JONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 49–78 (2005).

88. Early on, “regimes” were defined as “principles, norms, rules and decisionmaking procedures around which actors’ expectations converge in a given area,” STEPHEN D. KRASNER, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES 2* (Stephen D. Krasner ed., 1983), and as “sets of governing arrangements” that include “networks of rules, norms, and procedures that regularize behavior and control its effects,” ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 19 (1977). They required neither formal institutions nor enforcement powers, and hence much of the ensuing literature on

legal rules, in this view, as a winning long-term strategy to obtain self-interested ends. In other words, states act to maximize their own well-being and, indeed, their power through cooperative means.

More recently, Ulrich Beck, a German sociologist, made a similar observation in the context of state sovereignty. Writing of what he calls “cosmopolitan sovereignty,” he argues, “if sovereignty is measured in terms of political clout—that is, by the extent to which a country is capable of having an impact on the world stage, and of furthering the security and well-being of its people by bringing its judgments to bear[.]” then “increasing interdependence and cooperation, that is, a *decrease* in autonomy, can lead to an increase in sovereignty. Thus, sharing sovereignty does not reduce it; on the contrary, sharing actually enhances it.”<sup>89</sup>

States might relinquish some autonomy to obtain broader goals in a variety of specific ways. First, they might enter into international agreements as a way of projecting their own values, ideology, and commitment to fair play to others without engaging in costly military conquest. Human-rights law, in particular, might be understood as a mechanism for states with commitments to certain fundamental protections to encourage other states to adopt those same protections for their own citizens. Similarly, international law might be viewed as a way for weaker countries to bind stronger states to rules of conduct. In short, law can be a relatively low-cost means for states to control one another’s behavior. It might even be seen as a mechanism for governments to control future governments of their own country. Andrew Moravcsik argues, for example, that weak democracies pressed to delegate significant powers to European institutions through the European Convention on Human Rights because they hoped that by doing so they might prevent future backsliding on human-rights protections in their own countries.<sup>90</sup>

Second, states might enter into international agreements that entail delegations of authority as a relatively costless way of coordinating their activity. They might delegate some authority and accept minor restrictions on their freedom of action in order to obtain collective as well as individual efficiency. There are international agreements, for example, that establish uniform overflight rules that allow airlines to fly more directly and more safely

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regimes focused on informal cooperation and largely ignored traditional international organizations and international law. Yet the most recent work in this vein has adopted a broader view of institutions that encompasses law as well as international legal institutions. In this view, legal institutions, like other institutions, are seen as “rational, negotiated responses to the problems international actors face.” Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 768 (2001) (emphasis omitted).

89. Ulrich Beck, *The Terrorist Threat: World Risk Society Revisited*, 19 THEORY, CULTURE & SOCIETY 39, 48–49 (2002). See also ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY* (1995) (discussing the negotiation, adaptation, and implementation of modern international treaties).

90. Moravcsik, *supra* note 9, at 226 (“[I]nternational institutional commitments, like domestic institutional commitments, are self-interested means of ‘locking in’ particular preferred domestic policies . . . in the face of future political uncertainty.”).

between states,<sup>91</sup> provide uniform technical standards for railways to permit cars to easily pass from one state to another,<sup>92</sup> allow citizens of one state to drive in another,<sup>93</sup> and ensure that when they do, they will find recognizable road signs and signals.<sup>94</sup> The same can be said of a vast array of international regulatory agreements that establish standards for mail, commerce, weights and measures, and the like. These agreements work not because they are costless, but because they help states coordinate their behavior and thereby establish a regime that makes all those that participate better off.

Third, and perhaps most significant, states might enter into agreements that delegate authority to an international body in order to overcome a collective-action dilemma. Such agreements generally require reciprocal commitments by states—states agree to refrain from acting in certain ways in order to get others to do the same. Hence, for example, states negotiate and enforce lower trade barriers between them,<sup>95</sup> agree to forgo taxing income earned by their citizens in another's jurisdiction,<sup>96</sup> and offer certain legal protections to the financial investments by the citizens of another country.<sup>97</sup> States jointly agree to protect migratory species such as turtles, whales, and birds; have begun to tackle global warming; and peacefully share and manage fishery stocks and the oil and

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91. The International Air Services Transit Agreement, in conjunction with many bilateral agreements and the Convention on International Civil Aviation, permits civilian aircraft to fly across the territories of state parties without obtaining prior permission. *See* International Air Service Transit Agreement (1944), *available at* [http://dgca.nic.in/int\\_conv/Chap\\_II.pdf](http://dgca.nic.in/int_conv/Chap_II.pdf); Convention on International Civil Aviation (known as the Chicago Convention) (9th ed. 2006) (1944), *available at* <http://www.icao.int/icaoet/dcs/7300.html> (follow appropriate links for original and subsequent editions) (last visited Sept. 2, 2007). The Convention for the Unification of Certain Rules for International Carriage by Air (1999), *available at* [http://www.condonlaw.com/attachments/montreal\\_1999.pdf](http://www.condonlaw.com/attachments/montreal_1999.pdf), standardizes and internationalizes the various liability regimes under which air carriers operate.

92. The 1886 Convention on Technical Uniformity provides for uniform construction and maintenance of rolling stock and loading of railway wagons among member states. *See International Law: 100 Ways It Shapes Our Lives* (American Society of International Law, Washington, D.C.) 2006, at 14, *available at* [http://www.asil.org/pdfs/asil\\_100\\_ways\\_05.pdf](http://www.asil.org/pdfs/asil_100_ways_05.pdf) (listing one hundred ways international law affects the daily lives of citizens).

93. The 1949 United Nations Convention on Road Traffic, Sept. 19, 1949, 125 U.N.T.S. 22, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXI/subchapB/treaty1.asp> (last visited Sept. 3, 2007), allows citizens of member states to obtain an international driver's license.

94. The 1968 UN Convention on Road Traffic, Nov. 8, 1968, *available at* <http://www.geocities.com/bkkriders/law/unc/road1968.pdf>, facilitates and encourages the use of universal traffic rules, road signs, and signals in member states.

95. For example, the Agreement Establishing the WTO, and the North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

96. This is one purpose of bilateral tax treaties, of which there are hundreds. *See, e.g.,* Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003) (evaluating the failure of efforts to negotiate multilateral investment treaties and observing that thousands of bilateral investment treaties are in force).

97. There are hundreds of bilateral investment treaties between states. *See, e.g.,* Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483 (2004) (comparing international law with international tax law).

mineral resources of the seabed.<sup>98</sup> In short, states repeatedly delegate decisions to international bodies to achieve goals that would be much more difficult, if not impossible, for even the most powerful of them to achieve on their own.

Agreements that allow states to project their values, to coordinate their activity, and to overcome collective-action dilemmas do constrain state action in particular ways. But those restrictions of sovereign authority cannot be viewed in isolation from the benefits they yield, including states that are stronger and more effective in achieving their goals, and hence potentially more, not less, capable of acting independently.

## B. The Moral Argument: Human Rights

While the instrumental case for seeing benefits in international delegations is straightforward and widely accepted, if not always widely appreciated, the moral case is much more controversial. At the heart of much of the debate over international law lies a basic divide between those who believe that the nature of state sovereignty has changed as a consequence of the rise of human rights and those who do not. The first group sees state sovereignty as inherently bounded by certain limits established by core human-rights norms. The second group instead sees sovereignty as bounded only by those limits that the sovereign state itself accepts—and then only insofar as the sovereign state wishes to be bound.<sup>99</sup>

Those who take the position that sovereignty is limited by human-rights norms may disagree about where exactly those limits should lie—whether to draw the line quite narrowly at, for example, unlawful violations of basic bodily integrity through torture, genocide, political killing, and disappearance, or to draw it more broadly to encompass rights to health, education, food, and a living wage. But they all accept the underlying idea that certain limits, whatever they may be, exist.<sup>100</sup>

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98. See, e.g., United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243, available at <http://www.cites.org/eng/disc/text.shtml#texttop> (last visited Sept. 2, 2007); International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, available at [http://www.iwcoffice.org/\\_documents/commission/convention.pdf](http://www.iwcoffice.org/_documents/commission/convention.pdf).

99. This section, which is less applicable to international delegations than to international law more generally, is included in order to establish the point—not addressed by any other paper in this symposium—that sovereign consent is not the sole source of international legal legitimacy. This is, of course, only the beginning of an argument that deserves more complete treatment than can be offered here.

100. See, e.g., Louis Henkin, *Human Rights and State “Sovereignty,”* 25 GA. J. INT’L & COMP. L. 31, 31 (1995–1996) (suggesting that a half-century of human rights has been the cause, or the result, or both, of changes in international law, the international system, and the spread of “constitutionalism,” and stating that those changes have undermined assumptions about state sovereignty); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 869 (1990) (stating that contemporary international law protects the people’s, as opposed to the states’, sovereignty, and that internal human rights no longer fall completely within the jurisdiction of an individual state, but instead are the concern of the international community); Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49, available at

Critics of this position sometimes seize upon the uncertainty about the precise limits placed by human rights on state sovereignty as evidence that the position is untenable. They note that the disagreement reflects a fundamental problem with the argument—that is, the absence of any specific, legitimate source for this fundamental core of human rights. How can the law be legitimate, they ask, if its source is unidentified, or, even worse, if it simply derives from natural-law principles? When law is derived in this way, they argue, it serves as a cloak for morality, not law. And imposing morality as if it were law thereby imposes the cultural biases and religious beliefs of those who frame these “laws” on those who do not share them. Such critics cite the expansion of “rights” language to include a diverse array of issues, including labor rights, rights to food, rights to health care, and a right to be free from poverty.<sup>101</sup>

These concerns are not without merit. The position that domestic authority can be limited by human rights sometimes leads to such an expansive view of human rights that rights principles threaten to unjustifiably override the principles of self-determination and autonomy. Nonetheless, the critics are wrong to argue that human rights cannot be justified as an external limit on state authority. State sovereignty, after all, is itself a social and legal construct—a creation of the modern international legal system. Indeed, in the history of humanity, state sovereignty is a relatively new concept.<sup>102</sup> A sovereign state gains its very existence from the international community.

If a sovereign state is created by the international community, then it makes sense that its existence can be predicated on certain elemental requirements, including that it show respect for the sovereign rights of other states and for fundamental human rights of their citizens. States receive the benefits of state sovereignty under international law—most notably, the protection from the “threat or use of force” against them. They are recognized as the proper legal representative for the people located within a certain geographic area, deserving of formally equal treatment among other similarly situated

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<http://www.un.org/News/ossg/sg/stories/kaecon.html> (last visited Sept. 3, 2007) (declaring that state sovereignty is being redefined and states are being recast as “instruments at the service of their people”: “the aim [of the UN Charter] is to protect individual human beings, not . . . those who abuse them”).

101. For two views on whether rights language should be used in discussions of economic issues, see, for example, the debate between David Ellwood, Jeffery Frankel & Amartya Sen, *Human Rights Debate: Is the Language of Rights Useful in the Fight Against Poverty?* (Harvard Univ. Instit. of Pol., JFK Jr. Form Video and Podcast Archive, Feb. 11, 2005), *available at* [http://ksgaccman.harvard.edu/iop/events\\_forum\\_listview.asp?Type=PS](http://ksgaccman.harvard.edu/iop/events_forum_listview.asp?Type=PS) (scroll down to “2/11/2005” and choose Real Player link) (last visited Sept. 2, 2007) (addressing the utility of human rights language in discussions on poverty); see also Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse*, 23 B.C. THIRD WORLD L.J. 57 (2003) (discussing how human rights and international economic discourses intersect).

102. The origins of the nation-state were long traced to the Treaty of Westphalia in 1648. Today, however, most scholars agree it is, in fact, the invention of nineteenth-century Europe. See, e.g., Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT’L ORG. 251 (2001) (“[Westphalia is] a product of the nineteenth- and twentieth-century fixation on the concept of sovereignty.”).

representatives and capable of bargaining and entering agreements on behalf of those they represent. In return, states should have to accept some very basic limits on their behavior. Those entities that are not members of the international community do not have all the obligations membership entails, but they also do not receive all the protections it affords.<sup>103</sup>

This exchange is symbolized by and embodied in states' accession to the UN Charter.<sup>104</sup> To be permitted to accede to the Charter, a state must be recognized by the international community as the proper representative of a particular legal and political entity. This entrance into the Charter and into the international community brings recognition of a state's international legal sovereignty, thus granting it a "ticket of general admission to the international arena."<sup>105</sup> At the same time, the Charter carries with it certain obligations, among them that the state recognize similar rights in other similarly recognized states and that it observe basic limits on its treatment of its own citizens. These limits are found in the preamble to the Charter itself, as well as in the statute of the International Court of Justice, which is incorporated into the treaty and which explicitly recognizes certain fundamental principles of international law.<sup>106</sup>

Modern sovereignty is therefore not unconditional: to become a full participant in the international community, a state must accept that its sovereignty will be limited by basic human-rights principles. How far does this acceptance have to extend? At a minimum, it must extend to a fundamental core of human rights on which there is universal or close to universal agreement—that is, limits on government action that are shared by nearly every culture and religion, at least in aspiration, if not always in reality. This

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103. UN Charter art. 2, para. 4, *available at* <http://www.un.org/aboutun/charter/chapter1.htm> (last visited Sept. 3, 2007) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

104. This view of the Charter as a covenant that conditions membership in the community is not without precedent. It is, indeed, reflected in the recent report of the UN High-Level Panel on Threats, Challenges and Change. The panel wrote, "In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities." It continued, "Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community." United Nations, Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004), *available at* <http://www.un.org/secureworld/report2.pdf>.

105. MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE* 12 (1995).

106. Article 92 of the UN Charter incorporates the Statute of the International Court of Justice. *See* UN Charter art. 92, para. 4, *available at* <http://www.un.org/aboutun/charter/chapter1.htm> (last visited Sept. 3, 2007) ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."); *id.* art. 93, para. 1 ("All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."). The Statute of the International Court of Justice, in turn, provides that the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law." Art. 38 §§ 1, 1(b) 1945. This article of the statute is generally regarded as a definitive statement of the proper sources of international law.

fundamental core would include, for example, prohibitions on state-sanctioned torture, genocide, and political killings.

Some would argue for a larger core; others might argue for a smaller one. While such arguments will never be definitive, neither will they be unconstrained. To make the case that human-rights principles extend beyond this fundamental core, advocates will need to show that the additional limits on government action they demand also reflect broadly and deeply held norms. To make the case that even the core is too expansive, critics will have to show that the normative commitments referenced by advocates and international leaders do not, in fact, exist. Human-rights protections, in short, are the result of an evolving conversation. In an increasingly global society with changing social norms, how could it be otherwise?

If nothing else, imagining the alternative—a world in which there are no exogenous limits on state sovereignty and all discussions and actions directed toward establishing such limits are considered out-of-bounds—makes the case for taking human rights seriously. If there were no limits on state action, then a state could openly and flagrantly violate its own citizens' basic human rights, and no outside entity would be justified in intervening to stop it. Moreover, those who engaged in such acts could not be held responsible. Nuremberg, the International Court for the Former Yugoslavia, the International Court for Rwanda, and efforts to address the ongoing crimes in Darfur through the International Criminal Court would all be seen as unjustified impositions of external morality. The inevitable disagreement about the boundaries of core human rights should not lead to the frightening position that there are no boundaries at all. And if there are such boundaries, as there undeniably are, then there is yet another powerful justification for international law.

## V

### CONCLUSION

The modern scope of international delegation is vast and growing. Today, international organizations are delegated authority not just over how states behave toward one another, but over issues that touch on almost every area of domestic governance. From the WTO's regulation of trade policy, to the UN Security Council's rules regarding terrorist financing, to the Committee on Torture's interpretation of the permitted interrogation techniques, to the World Health Organization's vaccination guidelines, international organizations are increasingly playing an important role in the internal affairs of states.

This growing international influence has not been without controversy or resistance. Increasingly, scholars and public leaders alike worry that the benefits of international delegation come at too high a cost. They ask, does delegating authority to others mean that states are less able to make decisions for themselves even on issues that have little to do with cross-border interactions?

I have argued in this article that the answer is almost always no. When states consent to international delegations and retain ongoing power to monitor and

revoke that authority (as is generally the case), they lose little or no meaningful sovereign authority in the bargain. Under these circumstances, delegation is better seen as a mechanism through which states exercise—and even expand—their sovereign authority, than as a surrender of it.

Nonetheless, consent to international delegations does not entirely resolve the conflict between delegation and state sovereignty. Complicating the idea of sovereign consent are concerns about who consents for the states, time-inconsistent preferences of state governments, unintended consequences of delegations, and asymmetric power between parties. Hence, even in a world in which international delegations are made voluntarily by states, there is still a potential for tension between international delegation and state sovereignty. Exploring this tension is essential for thinking about the true costs of international delegation.

With a clearer picture of the costs of delegation in view, the natural question is whether these costs are justified. What, if anything, lies on the other side of international delegation's balance sheet? I have offered two answers: First, delegations may allow a state to pursue its true ends more effectively or efficiently than would otherwise be possible, enhancing a state's long-term sovereign authority in the process. Second, delegations may protect people's most basic human rights against incursions by the state. These benefits can outweigh, often vastly, any costs states incur in agreeing to international delegations.

To be sure, state leaders and analysts still need to weigh the costs imposed on domestic sovereign authority against the benefits of international cooperation and protections to human rights. The line between acceptable and unacceptable international delegations ultimately must be drawn through the democratic political process. This process, however, ought to be informed by an understanding of the true tradeoffs that delegation offers—its benefits as well as its costs.